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IN THE

Supreme Court of the United States

October Term 1966
No. 1383

LUCILLE MILLER,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California.

RESPONDENT'S OPPOSING BRIEF.

Statement of the Case.

Petitioner Lucille Miller was indicted for the murder of her husband, Gordon Eugene Miller, on October 20, 1964. She had been arrested on October 9, 1964, the morning after her drugged husband had been burned alive in the family Volkswagen which she had been driving. She was charged with violation of section 187 of the Penal Code of the State of California and was found guilty of that charge by a jury with a finding of murder in the first degree. Her motion for a new trial was denied and she was sentenced to life imprisonment.

On Appeal, the California Fourth District Court of Appeal, by a unanimous decision, affirmed the judgment of the trial court. See *People v. Miller,* 245 A.C.A. 111, 53 Cal. Rptr. 720. Hearing in the Supreme Court of the State of California was denied on December 14, 1966.

Statement of Facts.

Gordon Eugene Miller died in a matter of seconds as a result of an incendiary conflagration started in the passenger compartment of his car, with an accelerant, on a dark, lonely, deserted road while sound asleep from an overdose of nembutal, which he was not in the habit of taking and which had not been in his system for more than two to four hours, and petitioner, his wife, was the only person who could have given him the drug which she had procured without his knowledge and started the fire, and she had long since lost her affection for him and given it to another man. This capsule summary of the facts was conclusively supported by the evidence which is sufficiently set forth in the Opinion of the Fourth District Court of Appeal.

Questions Presented by Petitioner.

It is contended by petitioner that certiorari should be granted on the following grounds:

1. Statements obtained in violation of petitioner's right to counsel improperly admitted into evidence.

2. Misconduct of the district attorney in the *voir dire* of the jury on the issue of capital punishment.

3. Evidence obtained as a result of an unlawful search and seizure of the Miller automobile.

These contentions are deemed by respondent to be without merit and are herein controverted and opposed on the grounds that there was no violation of petitioner's constitutional rights to counsel and of self-incrimination in the introduction of her statements to the undercover agent; that petitioner has waived the right to complain about the introduction of her statements by failure to object in the trial court; that in a capital case the prosecution is entitled to inquire whether jurors have conscientious scruples against imposing the death penalty which would prevent them from finding the defendant guilty and imposing the death penalty; and that there was no unreasonable search and seizure of petitioner's automobile.

ARGUMENT.

I.

No Substantial Federal Question Is Presented Under Petitioner's Contention That Statements Were Obtained in Violation of Her Constitutional Rights to Counsel and Against Self-Incrimination.

Petitioner contends that she has established a substantial federal question based upon the introduction of statements made to an undercover agent which were introduced into evidence at her trial. She contends that the statements were obtained in violation of the rules set forth in the case of *Massiah v. United States*, 377 U.S. 201 (1964), and the case of *Escobedo v. Illinois*, 378 U.S. 478 (1964). No substantial federal question is presented by petitioner because the record fails to establish that the undercover agent obtained statements from petitioner in violation of *Massiah* and *Escobedo*, *supra*. Furthermore, petitioner intentionally waived the right to complain about the introduction of her statements when she did not object to the testimony. In any event, the testimony was merely cumulative of evidence already properly admitted so that its introduction was harmless beyond any reasonable doubt. In fact, the Fourth District Court of Appeal in effect held that it did not have the slightest idea that petitioner had been injured by the introduction of her statements to the undercover agent.

Before the undercover agent took the witness stand the prosecution had already proved that appellant's motive had been to get rid of her husband so that she could be free to marry another man. While she waited for him, she did not want to have money problems;

thus the insurance proceeds, in excess of $100,000, were an additional motivating factor. The underlying motive for the murder was shown to be the fact that appellant was a selfish and avaricious woman who had long before lost all love and interest in her husband and the life he had provided her. She wanted another man's love, money, social status, prestige, elegant surroundings, and association with wealthier people.

There had been testimomy by Walter R. Nourse, the family accountant, that during 1964 the victim's income had been $15,299.76 after business expenses [Rep. Tr. p. 940] and that in 1963 he had talked over insurance on the victim's life with petitioner. [Rep. Tr. p. 1952.] There was testimony that she told Erwin Sprengel, the man who built her new home, that she disliked her husband and that if he interfered with her new house plans he would "get his." [Rep. Tr. pp. 829-830.] Sprengel testified that within three months of the murder petitioner told him that she had lost any affection whatsoever for her husband and instead loved another man and wanted to marry him. [Rep. Tr. pp. 827-832.] Sprengel testified that after having filed for divorce and separated from her husband she resumed living with him only for the money he could earn. [Rep. Tr. pp. 832-833, 909.] There was testimony that in late August, a little over a month before the murder, petitioner told Erwin Sprengel's wife, Marilyn, that she had the trump card over the other man in their relationship. [Rep. Tr. pp. 924-925.] On September 22, 1964, two weeks before the murder, petitioner told Mrs. Sprengel that in spite of the things that had recently taken place, that she still loved the other man; that this was not the sort of thing that you could just turn off. [Rep. Tr. pp. 930-935.]

There was testimony that she told the investigating officer that she had gone with the other man about six months; that she had discussed this romance with her husband; that she did not love her husband; that he had rejected her for years; and that he had lived with the knowledge that she loved the other man. [Rep. Tr. pp. 1058-1061.] She told the investigating officer that she knew her husband had over $100,000 in life insurance and that she was the beneficiary. [Rep. Tr. pp. 1070-1071.]

After the brief testimony of the undercover agent to the effect that petitioner had not loved her husband but had respected him, that she had always loved the other man and still loved him, and that as soon as this mess was over that she planned to take her daughter Debbie and the two boys away to Europe with the insurance money of over $100,000 because of the accidental death [Rep. Tr. pp. 1098-1101], there was further testimony on this subject from civilian witnesses. Harold J. Lance, her attorney, testified that she was the beneficiary of nearly $100,000 in life insurance on the victim's life. [Rep. Tr. pp. 1194-1198.]

Arthwell Hayton, the other man, testified that earlier in the year she had told him that she had never loved her husband, that her marriage was a mistake, and that she did not want to live with him any more. [Rep. Tr. pp. 1119-1120.] He testified that they carried on a motel affair, the last time within three months before the murder. [Rep. Tr. pp. 1181-1182.] He testified that about six months before the murder she proposed marriage to him as soon as they could divorce their respective mates. [Rep. Tr. pp. 1121-1125.] He testified that he declined to marry her but that she per-

sisted in the months that followed (his wife having conveniently died two days after petitioner's illicit proposal of marriage). [Rep. Tr. pp. 1125-1134, 971-979.] Petitioner continued to pursue Hayton with loving attention and assistance with his children in his time of grief. She did not deny that she had told people that Hayton was going to marry her and move to her house. Her activities were noticed by the community; and Hayton, to preserve his reputation, decided to break with her. Petitioner was furious. The obstacle to her plans was an unwanted and unloved husband. Petitioner called Hayton's secretary to tell her to shut off the phone calls that were advising Hayton against her, and she told the secretary that she intended to marry Hayton. [Rep. Tr. pp. 971-972, 979.] Petitioner had been involved in an automobile accident and asked Hayton, an attorney, to take her case. She used this device to have him come over to her house, but he still refused to renew their affair. Petitioner waited for the community furor to calm down and then she asked Hayton to come to her. He again refused, but she bided her time and eventually he did come to her and he weakened to her charms on June 22, 1964, when they went to a Palm Springs motel together. [Rep. Tr. pp. 1130-1134, 1182-1183, 1215.] From this point on, it was clearly shown by her statements that she believed that if she could get Hayton to meet her, she could control him through sex. [Rep. Tr. pp. 858-866.] During this period after Hayton broke off the affair petitioner telephoned him constantly to establish contact, but he was either curt with her or would not talk to her at all. She maintained contact with him through his children and friends. She pumped their mutual friend Erwin

Sprengel for information about him and asked Sprengel to take messages to him, telling Sprengel that she loved and wanted to marry Hayton. [Rep. Tr. pp. 827-829, 830-832.]

Petitioner filed for divorce July 8, 1964. Hayton began to show interest in other women, and petitioner's reaction was outrage and foolish retribution when she followed Hayton while he was on a date with another woman and tried to wreck his boat with him and his date aboard. It gave her an opportunity to once again get close to him when she waited outside his home for him to return from the date. At that time she expressed her jealousy and the intention never to be cast aside by him. She revealed her vicious capabilities by threatening to expose him to public ridicule through the disclosure of his immorality. [Rep. Tr. pp. 983-988, 1134-1145, 1217.]

Toward the end of July, a little over two months before the murder, when the friction between petitioner and Hayton had had a chance to cool down, she once again approached him with repentance and sweetness on the telephone. When this tack was unavailing and she was again rejected, she became furious and resorted to the most vile of threats to expose Hayton to the community. [Rep. Tr. p. 1147-1158, 984.] Petitioner attempted to have further blackmail threats pass to Hayton through Sprengel when she revealed a tape recording she had made in the Cadillac on one of their clandestine dates and other "incriminating" evidence, as well as the threat of an outraged husband's vengeance. She told Sprengel that she did not want Hayton to hate her, and that if she could talk to him she could soothe him and he would weaken. [Rep. Tr. pp. 853-879.]

In light of this damning evidence on the issue of motive to be rid of her husband, the brief direct testimony of the undercover agent, occupying one page of the Reporter's Transcript, pales and is placed in its proper perspective in the case. The testimony was of minor significance and it is abundantly clear beyond any reasonable doubt that the testimony was cumulative and therefore harmless.

When the undercover agent was called to the stand as a witness for the prosecution, petitioner's counsel raised an objection that he had not been furnished with the witness' address as promised. At the suggestion of the court, proceedings were then continued in the judge's chambers outside of the hearing of the jury. [Rep. Tr. pp. 1007-1008.] Once in chambers counsel for petitioner said [Rep. Tr. p. 1009]:

> "I am going to represent to the Court also that any testimony of this witness concerning any statement made by my client would be in violation of the rule in the Dorado[1] case. She was an undercover agent, and never informed my client of her capacity. Never advised my client of my client's right to remain silent.
>
> "I previously had served on the District Attorney and the Sheriff of this County a demand to be present at any interrogation of my client by any agent of the Sheriff's office. So, any testimony of this witness concerning any statement made by my client not only violates the rule in the Dorado case, but the rule in People versus Sharer as well, and also the rule in Massiah versus the United States."

[1](Footnote ours.) *People v. Dorado*, 62 Cal. 2d 338.

The district attorney offered counsel for the defense an opportunity to interview the witness, and counsel took advantage of that opportunity. [Rep. Tr. pp. 1009-1010.] The district attorney stated [Rep. Tr. pp. 1010-1012]:

> "Now, so far as the rest of it, the right under the Dorado case and Massiah case and the rest of them, the right of a witness, a defendant to remain silent. It is a defendant's right, not an attorney's. The defendant may waive this right, provided the defendant does so intelligently, knowingly and understandingly. This is the gist of all of those cases.
>
> "Now, this particular witness did not interrogate his client. She specifically told her, the testimony will be that she specifically advised Mrs. Miller not to talk. Her testimony will be that Mrs. Miller told her that her attorneys had advised her that there probably would be somebody in jail trying to pump her and Miss Fisk, as part of her technique, I suppose, told Mrs. Miller: 'Well you shouldn't talk to anybody except your attorneys and the Sheriff,' and, of course, she never did talk to the Sheriff, so that is beside the point.
>
> "She stayed up in the jail with her for about a week and listened and when Mrs. Miller would talk to her, on two or three occasions, she told her 'Don't tell me about it,' but Mrs. Miller insisted on telling her. It is Mrs. Miller's right and privilege to talk, if she wants to.
>
> "Nobody pumped her. Nobody interrogated her. No attempt was made to force her to talk at all. She did talk, and some statements which she made

which are material to this case, we will desire to have her testify about them, and statements in the report which Mr. Foley saw last December."

The trial court suggested that the prosecution withdraw the witness and give counsel an opportunity to talk to her, but that on the other objection she would have to be sworn and at least testify to the preliminary questions and have an objection made at the proper time. [Rep. Tr. p. 1015.]

The following morning the undercover agent was the first witness. She was called to the witness stand and asked preliminary questions as to her occupation and the fact of her undercover placement in petitioner's jail cell. The district attorney asked her if petitioner had talked about herself, the reason she was in jail, about her husband, and about any domestic problems she had had. At that point petitioner's counsel asked to take the witness on *voir dire,* at which time he asked if she had informed petitioner that she was a law enforcement agent, of her right to remain silent, and of her right to have an attorney present. The witness testified that she told appellant that she should discuss this with her attorney. Counsel for petitioner closed his *voir dire* examination and the direct examination was resumed. Counsel for petitioner did not interpose any objection whatsoever to the testimony of the undercover agent. Nor did defense counsel attempt to lay any foundation that there had been any process of interrogation that lent itself to eliciting incriminating statements. He was clearly cognizant of the *Escobedo* and *Massiah* decisions, for he had raised the point in chambers before the undercover agent was called as a witness. He took the witness on *voir dire;* did not

establish any facts remotely resembling a process of interrogation on the part of the undercover agent; but in fact established with two minor exceptions, that the undercover agent was specifically instructed only to listen to petitioner and that she had followed those instructions. [Rep. Tr. p. 1112.] Later, in cross-examination, counsel developed that the undercover agent had brought certain things to the attention of appellant which might have provoked comment by her; however, it was never shown that any incriminating statements whatsoever were provoked by these matters.

Counsel for petitioner made no attempt to have the testimony of the undercover agent stricken. A great deal of her testimony was favorable to the defense, for it brought out that petitioner stoutly maintained her innocence and told identically the same story, to which she later testified. Defense counsel had received a copy of the undercover agent's reports to her superiors concerning her talks with petitioner, and it is reasonable to assume that defense counsel was willing to have the undercover agent testify to show the extremes to which the sheriff went to try to convict her and to show that her story of innocence had never varied. Having deliberately chosen to waive her constitutional objection to the testimony of the undercover agent and to present the undercover agent's highly favorable testimony to the jury petitioner cannot now have her cake for she has eaten it.

It is the law in the State of California that the raising of the issue of denial of counsel during interrogation on appeal, after the enunciation of rule in *Escobedo,* must be based upon an objection taken in the court below. *People v. Perez,* 62 Cal. 2d 769, 774;

People v. Davis, 62 Cal. 2d 791, 795-796; *People v. Palmer,* 236 Cal. App. 2d 645, 650; *People v. Brown,* 238 Cal. App. 2d 924, 929; *People v. Almond,* 239 Cal. App. 2d 46, 49; *People v. Martinez,* 239 Cal. App. 2d 161, 166; *People v. Valdez,* 239 Cal. App. 2d 459, 466; *People v. Robinson,* 239 Cal. App. 2d 579, 587; *People v. Woods,* 239 Cal. App. 2d 697, 705; *People v. Arnold,* 243 Cal. App. 2d 510, 515; *People v. Larke,* 246 A.C.A. 646, 649-650; *People v. Hansard,* 245 A.C.A. 720, 726. The California cases place emphasis on the fact that the decision to waive objection to the introduction of statements of the accused can be attributed to a tactical decision by trial counsel. As pointed out above, the tactics of counsel in the instant case were obvious. The federal courts will deny a defendant relief if the state courts refuse to entertain federal claims on the merits where a defendant for strategic and tactical reasons deliberately bypasses state procedures. *Fay v. Noia,* 372 U.S. 391, 439 (1963).

Under California law counsel for petitioner could have requested that the trial court take evidence outside of the presence of the jury on the issue of whether the statements made by petitioner to the undercover agent were voluntary and were not obtained in violation of petitioner's right to counsel. *People v. Schader,* 62 Cal. 2d 716, 727-728. In that case the California Supreme Court held that pursuant to the case of *Jackson v. Denno,* 378 U.S. 368 (1964), and the case of *People v. Gonzales,* 24 Cal. 2d 870, 876-877, this procedure should be followed by the trial court. Counsel for petitioner made no such request for the obvious reason that after having reviewed the report of the

undercover agent and after having interviewed her, he determined that it was in the best interest of his client that the undercover agent be permitted to testify. This is the only reasonable conclusion that can be drawn from the record. The trial court had not ruled that counsel would not be permitted to introduce evidence on the issue of the introduction of the undercover agent's testimony. There had been no objection, no complaint, and no ruling on the issue of *Massiah* and *Escobedo* decisions. There had merely been a discussion in chambers of the applicable law which was never renewed by counsel. An objection not raised at the trial will not be considered on certiorari to the United States Supreme Court. *Brown v. Allen,* 344 U.S. 443, 480 (1952). A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right. *Henry v. Mississippi,* 379 U.S. 443, 447 (1965).

Petitioner relies on some language in the Opinion of the Fourth District Court of Appeal in the instant case in arguing that there is no waiver in the State of California when there is a deliberate failure to object to the introduction of statements obtained in violation of the *Massiah* and *Escobedo* decisions. In its Opinion the District Court of Appeal said (p. 143):

> "And if we had the slightest idea that defendant was injured by it we would have no hesitancy in ordering a reversal in spite of the fact of defendant's failure to object to Peggy's testimony."

The reference to the failure to object was dictum because the court went on to hold that petitioner herein was precluded from raising the point by reason of the

failure to object. *People v. Miller, supra,* 245 A.C.A. 111, 143-144. The above statement was made to emphasize the fact that there was no possible prejudice from the introduction of the undercover agent's testimony and was a remarkable example of prescience in view of this Honorable Court's recent decision in *Chapman v. California,* 35 U.S.L. Week. 4197 (1967). The Fourth District Court of Appeal undertook a thorough examination of all aspects of the case and although it did not express the rule of harmless error beyond reasonable doubt in those terms, it clearly reached that conclusion regarding petitioner's statements to the undercover agent.

Petitioner contends that the nature of the questioning in the instant case was identical to that in *Massiah* (surreptitious questioning by Government agent). On the contrary, there was no process of interrogation undertaken by the undercover agent and the statements were entirely spontaneous on the part of appellant. The *Massiah* and *Escobedo* cases are not in point, because in both cases the statements obtained were held to have been the result of a process of interrogation. Of course the case of *Miranda v. Arizona,* 384 U.S. 436 (1966), decided after petitioner's trial, is not applicable to this case. *Johnson v. New Jersey,* 384 U.S. 719 (1966). The contention of petitioner in the absence of a record showing that her statements were the result of a process of interrogation is clearly subject to the rule that this Honorable Court will not review questions not clearly raised on the record. *Standard-Vacuum Oil Co. v. United States,* 339 U.S. 157, 160 (1949). The circumstances of this case preclude any conclusion that the statements of petitioner made in the presence of the

undercover agent fall within the exclusionary rule of the *Massiah* and *Escobedo* decisions.

It is well established that the authorities charged with law enforcement may place an agent in a jail cell so as to overhear incriminating statements on the part of an accused. *Lopez v. United States,* 373 U.S. 427, 438-439; *People v. Lopez,* 60 Cal. 2d 223, 248. So long as incriminating statements are not elicited by a process of interrogation, the information obtained by such an agent is admissible and does not violate the rules of *Massiah* and *Escobedo.*

Appellant's statements to the undercover agent were not confessions as defined in *People v. Speaks,* 156 Cal. App. 2d 25, 34, and *People v. Ferdinand,* 194 Cal. 555, 568-569, but were instead merely admissions as defined in the last cited case. Appellant's statements to the undercover agent were nothing more than a reiteration and duplication of various statements already properly introduced into evidence and were therefore entirely cumulative. In that respect admission of the statements was not prejudicial under California law. *People v. Jacobson,* 63 Cal. 2d 319, 331; *People v. Cotter,* 63 Cal. 2d 386, 398.

There is no necessity for this Court to grant certiorari to determine whether inculpatory admissions obtained in violation of the *Massiah* and *Escobedo* cases can ever constitute harmless error. This Honorable Court has already expressly declined to adopt any rule that a constitutional error, regardless of the facts and circumstances, must always be deemed harmful. *Chapman v. California, supra,* 35 U.S.L. Week. 4197 (1967).

II.

No Substantial Federal Question Is Presented Under Petitioner's Contention That She Was Deprived of a Jury of Her Peers by the Disqualification of Prospective Jurors Who Had Conscientious Scruple Against Imposing the Death Penalty.

Petitioner contends that this Honorable Court should grant certiorari to determine whether it is unconstitutional for a prosecutor, who does not intend to seek the death penalty from the jury, to disqualify for cause those jurors who have conscientious scruple against imposing the death penalty. The Opinion of the District Court of Appeal at 137-139 points out that the record does not disclose that the prosecutor did not intend to seek the death penalty from the jury. The Opinion is a complete answer to petitioner's contention. We would merely add the language of the California Supreme Court in the recent case of *People v. Gonzales*, 66 A.C. 494, 509-510:

> "Gonzales takes issue with the final sentence above quoted and urges a reconsideration of our position. It is argued that the institution of 'death qualified' jurors in capital cases denies the defendant the right to be tried by a 'fair and impartial jury' of his peers. (Pen. Code § 1078; U.S. Const. amend. VI.) Because (1) a *guilt* jury from which persons opposed to the death penalty have been excluded is not a representative sample of the community, and (2) such an unrepresentative jury is neither fair nor impartial in its *guilt* determination due to the fact that persons without conscientious scruple against the death penalty tend to be persons with the kind of 'authoritarian personality'

which is more responsive to the prosecution's case than to the defendant's case. (Citing Oberer, *Jury Selection, The Death Penalty,* and *Fair Trial,* 71 Case and Comment No. 4, p. 3; Adorno et al., The Authoritarian Personality (1950).)

"These arguments, while superficially attractive, simply do not stand against the reasoning of our *Smith* and *Gilbert* cases. First, as to the matter of 'representative sampling,' it is clear that such an ideal has never been the practice of the criminal law. The very reason for challenges for cause is to weed out that part of the random sample having characteristics thought to render objective judgment difficult. Second, as we pointed out in *Smith* and *Gilbert,* the legislature through its enactment of section 190.1 of the Penal Code (see footnote 9, *supra*) expressed a preference for a single jury qualified to act throughout both phases of a case involving the death penalty. 'Such legislative preference for the same jury at both trials deprives the defendant neither of due process nor of the right to an impartial jury. Since all of the evidence properly introduced at the trial on the issue of guilt is relevant in determining the penalty (Pen. Code, § 190.1), having the same jury avoids repetition of evidence and is thus not an arbitrary requirement.' (*People v. Gilbert, supra,* 63 Cal. 2d 690, 712; see also, Report to the Board of Governors of the Committee on Criminal Law and Procedure, 41 State Bar J. 798, 799.) Third and finally, it should be observed that section 1074, as interpreted by us in *Riser,* compels the exclusion of all prospective jurors whose 'conscientious opinions'

would prevent the proper exercise of the discretion contemplated by section 190. This certainly means that challenges for cause pursuant to section 1074 should be granted where it is made to appear that a prospective juror's predisposition *in favor of* the death penalty would prevent his voting for life imprisonment in a proper case. It is therefore difficult to see how either the prosecution or the defense could be favored by a proper administration of section 1074 of the Penal Code. (See *People v. Gilbert, supra*, 63 Cal. 2d 690, 712.)"

The rule of procedure suggested by petitioner that the prosecutor declare whether or not he will seek the death penalty before the trial and thereafter be bound would be subject to undesirable results. This in effect would exert force on a district attorney who had a conscientious feeling that it was a case justifying the death penalty at the beginning and who subsequently changed his opinion that it was a case justifying life imprisonment to unreasonably hold to the first opinion lest he be accused of misconduct. No such pressure should be exerted upon the office of the district attorney. It is only at the time of the penalty hearing that a district attorney will be in a position to review all the evidence in the case and to weigh the desirability and the probability of the imposition of the death penalty by the jury as against the expense and strain of a jury trial on the subject. In addition, the jury knows that a murder case is one where the punishment may be death and this knowledge will influence a juror with conscientious scruple against capital punishment unless that juror is told that the prosecution is not seeking death penalty and probably even if the juror is told. The

prosecution should not be required to weaken its case by telling the jury that the case is not serious or definite enough to warrant the higher penalty. It is respectfully submitted that petitioner has set forth neither justifiable nor established ground to object to the procedure which was followed in the selection of the jury in the instant case.

III.

No Substantial Federal Question Is Presented Under Petitioner's Contention That There Was an Unreasonable Search and Seizure of the Automobile and Its Contents.

Petitioner contends that this Honorable Court should grant certiorari to determine whether the introduction of evidence obtained from the warrantless search of a car not incidental to an arrest, but for fire investigation purposes, constituted a violation of petitioner's rights under the fourth and fourteenth amendments to the United States Constitution. In petitioner's brief filed in the District Court of Appeal below, petitioner did not set forth the nature of the evidence that was the product of an unreasonable search and seizure other than to indicate that the burned-out Miller Volkswagen was examined by police experts. There was expert testimony as to the condition of various parts of the automobile and there were some exhibits introduced consisting of a burned tire [Ex. 23], a tire rim [Ex. 24], a gasoline cap [Ex. 36], a gasoline can nozzle [Ex. 36], a gasoline can lid [Ex. 38], and a light switch [Ex. 43]. All of the above items were plainly in view without the necessity of a search. All the parts of the automobile were plainly open to view without the necessity of a search. The only act that was necessary on the part

of the experts was to brush aside some ashes to reveal the gas can tops.

The Miller Volkswagen had been thoroughly opened, both in front and in the back, as well as in the passenger compartment, in order to quell the fire. It had been burned up and totally destroyed and was towed off the highway. The trunk, the engine compartment, and the passenger compartment were all opened to public view. The officers and experts did no more than that which any person on the premises could have noticed. Naturally the officers and the experts were examining what they could see with more scrutiny than an ordinary member of the public.

In *Bielicki v. Superior Court,* 57 Cal. 2d 602, 605, the court gave the following explanation of the term "search" as used in the fourth amendment of the United States Constitution and in article I, section 19, of the California Constitution:

> "'[T]he term implies some exploratory investigation or an invasion and quest, a looking for a seeking out. . . . A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way.' [Citation.] The constitutional guarantees, of course, prohibit not all searches but only those that are 'unreasonable.' [Citations.] And 'there is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.' [Citations.]"

The rule is settled in California that looking through a window and viewing that which is patent and visible

to the public does not constitute an unreasonable search. The fact that an officer may tend to observe more accurately than the public at large does not change the situation. *People v. Holloway,* 230 Cal. App. 2d 834, 839. In that case the court said:

> "The essence of the search is the viewing of that which was not only intended to be private or hidden, but that which was, so far as the one search is able to do so, made concealed or closed from open viewing. . . ."

Equally well settled in California is the rule that observing that which is in plain sight in an automobile is not a search. *People v. Murphy,* 173 Cal. App. 2d 367, 377; *People v. Terry,* 61 Cal. 2d 137, 152.

In view of the above cited cases it is abundantly clear that no unreasonable search and seizure took place in the instant case but merely an examination of that which was patent and obvious in the lawful investigation of a possible arson-murder. It should be pointed out that most of the evidence that was gathered by the prosecution was utilized by the defense in its theory of an accidental fire. It would seem that there was no harm to appellant by reason of circumstantial evidence obtained from the car by the prosecution, but only in the reasonable inferences to be drawn therefrom.

The Opinion of the District Court of Appeal impliedly assumes that there was no search and seizure in the instant case. The Opinion merely assumes for the sake of argument that there was a search when it goes on to say that the examination of the car was reasonable for the commendable purpose of trying to find out why the fire had occurred. We respectfully submit

that the Opinion of the District Court of Appeal is correct and that petitioner has raised no substantial question of unreasonable search and seizure.

Conclusion.

This concludes the response to the petition in the instant case. Respondent believes that when the record is examined relevant to the matter complained of, and the Opinion of the California District Court of Appeal is considered, it will be concluded that no right guaranteed by the Constitution of the United States was violated, and that the judgment should stand. Accordingly, respondent submits the matter on the record heretofore presented to this Court, respondent's brief in the Court of Appeal and Answer to Petition for Hearing in the Supreme Court, the Opinion of the California District Court of Appeal, and the arguments set forth above, and requests that the relief asked by this petitioner be denied.[2]

Respectfully submitted,

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[2]We herewith lodge copies of respondent's brief in the Court of Appeal and respondent's answer to petition for hearing in the Supreme Court to be included in the record pursuant to Rule 21(6).